

FILE COPY

Supreme Court, U. S.

FILED

DEC 1 1947

CHARLES E. BROWN, CLERK

Supreme Court of the United States
OCTOBER TERM, 1947

NO. 290

JAMES M. HURD AND MARY I. HURD,
Petitioners,

vs.

FREDERIC E. HODGE, LEONA A. MURRAY HODGE, PAS-
QUALE DERITA, VICTORIA DERITA, CONSTANTINO
MARCHEGIANI, MARY M. MARCHEGIANI, BALDUINO
GIANCOLA AND MARGARET GIANCOLA, *Respondents.*

NO. 291

RAPHAEL G. URCILOLO, ROBERT H. ROWE, ISABELLE J.
ROWE, HERBERT B. SAVAGE, GEORGIA N. SAVAGE
AND PAULINE B. STEWART,
Petitioners,

vs.

FREDERIC E. HODGE, LEONA A. MURRAY HODGE, PAS-
QUALE DERITA, VICTORIA DERITA, CONSTANTINO
MARCHEGIANI, MARY M. MARCHEGIANI, BALDUINO
GIANCOLA AND MARGARET GIANCOLA, *Respondents.*

CONSOLIDATED BRIEF FOR RESPONDENTS.

HENRY GILLIGAN,
JAMES A. CROOKS,
Attorneys for Respondents.

December 1, 1947.

INDEX.

	Page
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
1. The injunctive relief granted by the District Court is not contrary to the Federal Constitution or implementing legislation	4
(a) The Fifth and Fourteenth Amendments do not invalidate the restriction	4
(b) The Fifth and Fourteenth Amendments do not prohibit judicial enforcement of the restriction	9
(c) The Civil Rights Acts (Sections, 1977, 1978 and 1979, Revised Statutes) cannot prohibit judicial enforcement of the restriction	17
2. Restrictive covenants are not contrary to the public policy of the District of Columbia	18
3. Restrictive covenants are not an undue restraint on the power of alienation or repugnant to other rules of property	24
CONCLUSION	

TABLE OF CASES.

Allgeyer v. Louisiana, 165 U. S. 578	7
Anderson National Bank v. Luckett, 321 U. S. 233	14
Buchanan v. Warley, (1917) 245 U. S. 60	5, 9, 12, 13, 17
Burkhardt v. Lofton, (1944) 63 Cal. App. 2d 230, 146 P. 2d 720	7, 14, 21
Castleman v. Avignone, 56 App. D. C. 253, 12 F. (2d) 326	25
Chandler v. Zeigler, (1930) 88 Colo. 1, 291 P. 822	7
City of Richmond v. Deans, 281 U. S. 704	5, 12
Cohens v. Virginia, 6 Wheat. 264	11
Cornish v. O'Donoghue, (1929) 58 App. D. C. 359, 30 F. (2d) 983; cert. denied 279 U. S. 871	8, 22, 24
Corrigan v. Buckley, (1926) 271 U. S. 323	8, 15, 16, 17
Corrigan v. Buckley, (1924) 55 App. D. C. 30, 299 F. 899	8, 15, 18, 21
Cowell v. Colorado Springs Co., 100 U. S. 55	24

	Page
Davidson v. New Orleans, 96 U. S. 97.....	14
Dooley v. Savannah Bank and Trust Co., (1945) — Ga. —, 34 S. E. 2d, 522	7
Georgia v. Stanton, 6 Wall. 50.....	10, 11, 21
Grady v. Garland, (1937) 67 App. D. C. 75, 89 F. (2d) 817, cert. denied 302 U. S. 694.....	8, 22, 24
Harmon v. Tyler, 273 U. S. 668.....	5, 12
Hartford Fire Ins. Co. v. Chicago M. & St. P. R. Co. (C. C. A. 8th) 70 F. 201, Affirmed 175 U. S. 91.....	21
Heiner v. Donnan, 285 U. S. 312, 326	6
Hemsley v. Hough, (1945) — Okla. —; 156 P. 2d 182...	7
Hemsley v. Sage, (1944) 194 Okla. 669, 154 P. 2d 577...	7
Highland v. Russell Car & Plow Co., 279 U. S. 253.....	7
Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398.....	7
Hundley v. Gorewitz, (1942) 77 U. S. App. D. C. 48, 132 F. 2d 23	8, 22, 24
In Re Virginia, 100 U. S. 313.....	6
Lane v. Watts, 234 U. S. 525	11
Langdon v. Conlin, 67 Neb. 243, 93 N. W. 389.....	19
Lion's Head Lake v. Brezezinski, (1945) 23 N. J. Mis. R. 290, 43 A. 2d 729	7
Los Angeles Investment Co. v. Gary, (1919) 181 Cal. 680, 186 P. 596	7
Marbury v. Madison, I Cranch 137	10
Mays v. Burgess, 79 U. S. App. D. C. 343, 147 F. (2d) 869, cert. denied 325 U. S. 868.....	8, 12, 22, 23, 25
McCowen v. Pew, 153 Cal. 735, 96 P. 893	19
Meade v. Dennistone, (1938) 173 Md. 295, 196 A. 330.....	7, 12
Morgan v. Virginia, 328 U. S. 373	12
Nebbie v. New York, (1934) 291 U. S. 502	9
Parmalee v. Morris, (1922) 218 Mich. 625, 188 N. W. 330	7
Plessy v. Ferguson, 163 U. S. 537	6, 19
Porter v. Barrett, (1925) 233 Mich. 373, 206 N. W. 532.....	7
Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641	7
Railroad Mail Assoc. v. Corsi, 326 U. S. 88	6
Ridgeway v. Cockburn, (1937) 296 N. Y. Supp. 936.....	7
Russell v. Waller, (1929) 58 App. D. C. 357, 30 F. (2d) 981, cert. denied 279 U. S. 871.....	8, 22
Shileler v. Roberts, (1945) 69 Cal. App. 2d —, 160 P. 2d 67	7
Slaughter House Cases, 16 Wall. 36	6

	Page
Smith v. Allwright, 321 U. S. 649	12
Smith v. San Francisco & N. P. R. Co., 115 Cal. 584, 47 P. 582	19
Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192	12
Steward v. Cronan, (1940) 105 Colo. 393, 98 P. 2d 999 ..	7
Stone v. Jones, (1944) 66 Cal. App. 264, 152 P. 2d 19 ..	7
Torrey v. Wolfes, (1925) 56 App. D. C. 4, 6 F. (2d) 702	8, 22, 24
Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353	19, 21
U. S. v. Cruikshank, 92 U. S. 542	6
U. S. v. Dunnington, 146 U. S. 338	11
U. S. v. Harris, 106 U. S. 629	6
Virginia v. Rives, 100 U. S. 313	6
Wall v. Oyster, (1910) 36 App. D. C. 50	19
Wiegman v. Kresel, 270 Ill. 520	25

CONSTITUTION AND STATUTES.

Constitution of the United States:

ARTICLE I, SEC. 8	19
AMENDMENT FIVE	8, 9, 12, 16
AMENDMENT FOURTEEN	8, 9, 16
Alley Dwelling Act of 1934, as amended by Act of June 25, 1938, 52 Stat. 1186, D. C. Code (1940) Sec. 5- 103, et seq.	20
Charter of the United Nations and Statutes of Inter- national Court of Justice, U. S. Treaty Series 993, Art. 2, Chap. 1, Par. 7	23
D. C. Code (1940), Sec. 11-301	11
D. C. Code (1940), Sec. 45-501	12
Lanhan Act, Public 849, 76th Congress	20
U. S. Code, Title 8, Sections 41, 42, 43 (Revised Stat- utes, Sec. 1977, 1978, 1979)	17, 18, 23
U. S. Code, Title 28, Section 347	21
United States Housing Act of 1937, 50 Stat. 899, U. S. Code Title 42, Sec. 1401, et seq.	20

AUTHORITIES CITED.

National Capital Housing Authority Report, year end- ing June 30, 1945

20

Supreme Court of the United States.

OCTOBER TERM, 1947

NO. 290

JAMES M. HURD AND MARY J. HURD, *Petitioners,*

vs.

FREDERIC E. HODGE, LENA A. MURRAY HODGE, PAS-
QUALE DERITA, VICTORIA DERITA, CONSTANTINO
MARCHEGIANI, MARY M. MARCHEGIANI, BALDUINO
GIANCOLA AND MARGARET GIANCOLA, *Respondents.*

NO. 291

RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE J.
ROWE, HERBERT B. SAVAGE, GEORGIA N. SAVAGE
AND PAULINE B. STEWART, *Petitioners,*

vs.

FREDERIC E. HODGE, LENA A. MURRAY HODGE, PAS-
QUALE DERITA, VICTORIA DERITA, CONSTANTINO
MARCHEGIANI, MARY M. MARCHEGIANI, BALDUINO
GIANCOLA AND MARGARET GIANCOLA, *Respondents.*

CONSOLIDATED BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

Respondents deem a brief, succinct statement of the pertinent evidence essential.

In or about the year 1906 the twenty lots immediately west of the alley west of First Street in Square 3125 in the District of Columbia were improved by dwellings known

as 114 to 152 Bryant Street, N. W., all of them being sold subject to the following deed covenant:

"Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two Thousand Dollars which shall be a lien against said property."

The eleven lots adjoining said twenty lots westerly to Second Street, N. W., built about the same time, were improved by dwellings known as 154 to 174 Bryant Street, N. W., none of said eleven properties being subject to any restriction as to Negro ownership or occupancy. All of said houses front on the *south* side of said Bryant Street. On the *north* side is the U. S. Government Reservoir and filtration plant, McMillan Park, and the District of Columbia Pumping Station, running to within about 100 feet of Fourth Street, N. W. On the south side of Bryant Street, *west* of Second Street for approximately 150 feet are located a District storage yard and two District garages (R. 381). All lots in the 2300 block of First Street, N. W. in Square 3425, adjoining the 20 covenanted lots on Bryant Street, are subject to the same covenant. With the exception of four houses in the 2100 block of First Street, N. W. (now occupied by Negroes) all houses on First Street, from T Street to the Soldiers Home and all houses to the east of First Street to and including Lincoln Road, from T Street north to the Soldiers Home are occupied by persons of the white race (R. 380-381), and consisting of approximately 1000 homes, six churches, places of business and schools, all under either deed covenants or restrictive agreements on the Negro question and about 80% owner-occupied.

Respondents Hodge purchased their home in 1909, were original occupants, knowing of the Negro covenant; respondents Marchegiani purchased in 1930, relying on the Negro covenant (R. 108); the uncovenanted houses being then occupied by Negroes (R. 125); respondents Giancola purchased in September, 1936, relying on the Negro cove-

nanf (R. 81); De Rita purchased in 1940, relying on the Negro covenant (R. 129).

All of the alleged Negro petitioners admitted their color except the Hurds; Mrs. Hurd stated she did not know her color, but attended Negro schools and church, as did her son (R. 170). Mr. Hurd, claiming at the trial his mother and father "are considered as Mohawk Indians" (R. 238), did not deny admitting to respondent Mrs. Hodge that both he and Mrs. Hurd were Negroes (R. 20); stated to attorney for respondents in a letter that they were Negroes (R. 78); his application for renewal of his automobile driver's license showed that he was a Negro (R. 317); the Court observed them both and found them to be Negroes (R. 380). They had actual as well as constructive notice of the deed covenants (R. 381). All of the other Negro petitioners had actual and constructive notice of the deed covenants, and moved into the several properties *after service of the complaint upon them* (R. 382).

Petitioner Raphael G. Urciolo, who was the actual owner of six of the covenanted properties, is a white real estate speculator, who, regardless of court decisions, will sell Negro-restricted houses to Negroes, because he does not believe in such covenants (R. 147). On June 17, 1944, he was put on notice by letter that 5 of the houses owned by him in this subdivision were under deed covenant as to Negroes (R. 146); thereafter, on March 5, 1945, he filed Civil Action No. 27,958 against all other owners of the 20 covenanted houses to quiet title and remove the Negro covenant (R. 151-2); then he sold 3 of his houses to Negroes and instructed his attorney, Charles H. Houston, Esquire, to dismiss the Civil Action (R. 152-3); he made approximately \$10,500 on the sales of the three houses to Negroes (R. 153). He also sold and conveyed premises 126 and 144 Bryant Street, N. W., to Negroes, *after* the issuance and in violation of the judgment for injunction, which includes these properties in its provisions, and in violation thereof (R. 451, 452). The further Statement of the Case in peti-

tioner's brief (pages 4, 5) covering Findings of Facts, and Judgment of the District Court and the affirmation of the U. S. Court of Appeals, with dissent by Justice Edgerton, is substantially correct.

SUMMARY OF THE ARGUMENT.

1. The injunctive relief granted by the District Court is not contrary to the Federal Constitution or implementing legislation.

(a) The First and Fourteenth Amendments do not invalidate the restriction.

(b) The Fifth and Fourteenth Amendments do not prohibit judicial enforcement of the restriction.

(c) The Civil Rights Acts (Sections 1977, 1978 and 1979, Revised Statutes) cannot prohibit judicial enforcement of the restriction.

2. Restrictive covenants are not contrary to the public policy of the District of Columbia.

3. Restrictive covenants are not an undue restraint on the power of alienation or repugnant to other rules of property.

1. **The Injunctive Relief Granted by the District Court is Not Contrary to the Federal Constitution or Implementing Legislation.**

(a) **The Fifth and Fourteenth Amendments do not invalidate the restriction.**

The method of presentation adopted by petitioners would, at first, appear to raise numerous propositions in support of their contentions. An analysis of these points discloses, however, their underlying thesis is discrimination—by the respondents, by all white people, and by the Courts. This is not the true issue, nor has it ever been the true issue in this type of case.

Petitioners punctuate every point with the cry of prejudice—discrimination—denial of “fundamental rights”; they assume that only by casting aside established principles of law can their conception of *right* be attained; they ignore rights of others—not the least the fundamental right to contract and obtain enforcement of those contracts. How else can one enforce, by peaceful means, a valid contract save by seeking his legal rights in a court of competent jurisdiction?

The case of *Buchanan v. Warley*, 245 U. S. 60, permeates petitioners' brief, and appears to be the principal authority relied on in every point urged by them. That case involved the constitutionality of a municipal ordinance of Louisville, Kentucky, requiring segregation of the races in residential districts and forbidding transfers of property. The sole issue was whether such an ordinance was valid as a legitimate exercise of the police power of the state. This Court cast its decision squarely on that point:

“We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand” (245 U. S. 60, 82).

The cases of *Harmon v. Tyler*, 273 U. S. 668, and *City of Richmond v. Deans*, 281 U. S. 704, while differing in form, sought the same legislative result as in the Kentucky case. The *Harmon* case was a *per curiam* decision invalidating the legislative act on the authority of *Buchanan v. Warley*, as was the case of *City of Richmond v. Deans*, 281 U. S. 704. All of these cases involved legislative attempts to limit the use and ownership of real property. In each of these cases this Court did no more than hold that *legislative* action of a State, based solely on color, was repugnant to the Fourteenth Amendment of the Federal Constitution forbidding

any State to deprive any person of life, liberty or property without due process of law. In fact, every case on this point relied on by petitioners where this Court specifically held that the Constitutional guaranties under the Fourteenth Amendment were violated, involves State legislation.

In 1944, this Court in sustaining the Constitutional validity of the so-called New York Civil Rights Act, which provided that labor unions cannot refuse membership because of race, creed or color, emphasized that the prohibitions of the Fourteenth Amendment are addressed to legislative action:

"A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent State legislation designed to perpetuate discrimination on the basis of race or color." (Italics supplied) Railroad Mail Association v. Corsi, 326 U. S. 88. See also, Heiner v. Dohnan, 285 U. S. 312, 326.

And this Court has repeatedly distinguished clearly between State, county and municipal laws and ordinances, and the private actions or contracts of individuals.

Slaughter House Cases, 16 Wall. 36
U. S. v. Cruikshank, 92 U. S. 542
In Re Virginia, 100 U. S. 313
Virginia v. Rives, 100 U. S. 313
U. S. v. Harris, 106 U. S. 629
Plessy v. Ferguson, 163 U. S. 537.

The rights of respondents and all owners of property are derived from their contract, the subject-matter of which belongs exclusively to the contracting parties. This is individual action and must not be confused with the power of government to legislate. The limitation on governmental legislative action under the Fifth and Fourteenth Amendments is no more certain than the freedom of individuals to contract in relation to their property.

This fundamental right of contract has been given universal recognition.¹ And it has been applied consistently sustaining the validity of property restrictions created by private contract among property owners.

Burkhardt v. Lofton (1944), 63 Cal. App. 2d 230, 146 P. 2d 720.

Shiteles v. Roberts (1945), 69 Cal. App. 2d —, 160 P. 2d 67.

Stone v. Jones (1944), 66 Cal. App. 2d 264, 152 P. 2d 19.

Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596.

Chandler v. Zeigler (1930), 88 Colo. 1, 291 P. 822.

Steward v. Cronan (1940), 105 Colo. 393, 98 P. 2d 999.

Dooley v. Savannah Bank and Trust Co. (1945), — Ga. —, 34 S. E. 2d 522.

Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641.

Meade v. Dennistone (1938), 173 Md. 295, 196 A. 330 (Distinguishing private agreements from State legislation and city ordinances).

Parmalée v. Morris (1922), 218 Mich. 625, 188 N. W. 330.

Porter v. Barrett (1925), 233 Mich. 373, 206 N. W. 532.

Lion's Head Lake v. Brezeinski (1945), 23 N. J. Mis. R. 290, 43 A. 2d 729.

Ridgeway v. Cockburn (1937), 296 N. Y. Sup. 936.

Hensley v. Hough (1945), — Okla. —, 156 P. 2d 182 (Distinguishing restrictions created by private contract and race segregation ordinances).

Hensley v. Sage (1944), 194 Okla. 669, 154 P. 2d 577.

The Courts of the District of Columbia uniformly have held restrictions of the type here being attacked by petitioners not violative of the due process clause of the Constitution.

¹ *Highland v. Russell Car & Plow Co.*, 279 U. S. 253, 261; *Home Building & Loan Ass'n. v. Blaisdell*, 290 U. S. 398; *Allgeyer v. Louisiana*, 165 U. S. 578, 591.

Torrey v. Wolfes, 56 App. D. C. 4, 6 Fed. (2d) 702
Russell v. Wallace, 58 App. D. C. 357, 30 Fed. (2d) 981, cert. denied 279 U. S. 871
Cornish v. O'Donoghue, 58 App. D. C. 359, 30 Fed. (2d) 983, cert. denied 279 U. S. 871
Grady v. Garland, 67 App. D. C. 73, 89 Fed. (2d) 817, cert. denied 302 U. S. 694
Hundley v. Gorewitz, 77 U. S. App. D. C. 48, 132 F. 2d 23.

In *Hundley v. Gorewitz, supra*, the United States Court of Appeals for the District of Columbia, in 1942, stated:

“But in view of the consistent adjudications in similar cases, it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction.”

That same Court reiterated this proposition in *Mays v. Burgess*, 79 App. D. C. 343, 147 F. 2d 869, and this Court denied application for certiorari, 325 U. S. 868, where as in the present case, that Court refers to its opinion in *Corrigan v. Buckley*, 55 App. D. C. 30, appeal dismissed, 271 U. S. 323. In 1924 the Court of Appeals of the District of Columbia (now the United States Court of Appeals for the District of Columbia) specifically recognized and clearly sanctioned the right of private individuals to contract in respect of their property (55 App. D. C. 30, 31).

In their enthusiasm to read into the Constitution and decisions of this Court and many other Courts delivered in the past that which is not there, petitioners fail, and possibly refuse, to recognize the destructive effect of their proposition. They fail to apply the Constitutional guarantees equally to all citizens. While they urge that they will be denied the guarantees of the Fifth and Fourteenth Amendments to contract, as individuals, in respect of their property—to buy or sell, occupy and use—unless all past decisions are utterly cast out, they would, by such action, deny to respondents the same right to contract in respect of their property.

(b) The Fifth and Fourteenth Amendments do not prohibit judicial enforcement of the restriction.

Petitioners urge that the courts cannot enforce restrictions such as here involved because the judiciary, being a branch of government, is prohibited by the Constitution on authority of *Buchanan v. Warley, supra*. The language of that opinion (245 U. S. 60) does not, in any way, justify or give credence to petitioners' proposition. The Court clearly stated the question to be decided:

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, ~~solely~~ because of the color of the proposed occupant of the premises?"

and the Court's decision held specifically that the attempt of the State by *municipal ordinance* to prevent alienation and use of property to a person solely because of color was not "a legitimate exercise of the police power of the state". Certainly no one seriously will argue that the functions of a court are the "exercise of the police power of the state". The courts of the land are the only place where citizens may go to be relieved from the improper or oppressive exercise of the police power of the States; if that were not so the Constitutional guarantees would be mere guides to conscience rather than effective to assure protection to all citizens. This Court has said that "the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." (*Nebbia v. New York* (1934), 291 U. S. 502, 536.) It is too fundamental to require more than the mere observation that many acts of the Federal Government and the States, claimed to be discriminatory, do not involve Negroes. Petitioners appear to take the position that only Negroes are discriminated against; they do not concede

that the courts are the only place where law-abiding citizens may obtain equal protection of the laws and save themselves from being deprived of their property without due process of law.

Under our judicial system courts are established to give to all citizens the opportunity to have their private rights, in their dealing one with another, adjudicated by impartial tribunals. While the power of courts is derived from the people through their Constitutions and statutes, State and Federal, and in that sense is representative of governmental authority, it must be clear that never has it been seriously questioned that the judiciary is a separate and unique form of governmental function. If this were not so, private citizens could not fearlessly attack legislative and executive action before the courts. The courts are the guardians of the private rights of all citizens—in their relations with other citizens respecting their personal and property rights and in their relations with government, be it Federal or State. The courts do not hesitate to hold Acts of Congress and administrative activities of the Executive branch to infringe the rights of private citizens; nor do courts hesitate to adjudicate the innocence of persons charged with crime. Yet, it is the Executive branch of government which claims a crime has been committed. If the courts were government, as urged by petitioners, there could be no trial; for when the Executive says a criminal act has been committed, its alter ego—the courts—would function only to commit to jail, performing a mere ministerial function dictated by the Executive. This is obviously not our system; indeed it is a practice which we have strenuously criticized and condemned foreign powers for following.

The power of the judiciary as an independent agency, to examine and nullify Acts of Congress, has been recognized since *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60. The courts are not concerned with political issues, as emphasized in *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721, where

it was sought to restrain the putting into effect of an Act of Congress providing for military government in Georgia:

"For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence of a State, with all its constitutional powers and privileges. No case of private rights or private property infringed; or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the Court."

But where a State or the Federal Government improperly exercises its governmental functions so as to constitute invasion of private rights, the courts will take jurisdiction.

Cohens v. Virginia, 6 Wheat. 264
Lane v. Watts, 234 U. S. 525.

In *United States v. Dunnington*, 146 U. S. 338; a suit to recover money claimed to be due as a result of condemnation proceedings in the Supreme Court of the District of Columbia, and claimed to have been paid out of the registry of the court to the wrong party, this Court said:

"Assuming that the payment of the entire amount to the heirs of King was a mistake, it is difficult to see how the United States can be held responsible for it. *The courts of the United States are in no sense agencies of the Federal Government*, nor is the latter liable for their errors or mistakes; they are independent tribunals, created and supported, it is true, by the United States; *but the government stands before them in no other position than that of an ordinary litigant*.
 (Italics supplied)

Petitioners' thesis is that the District Court, exercising its general jurisdiction in the District of Columbia,² by its very entertaining of the suit to enforce the restrictive covenant, regardless of the result, i.e., judgment for injunction, has denied the petitioners their property rights without

² Section 11-301, D. C. Code (1940).

due process of law contrary to the Fifth Amendment of the Constitution. They say this is true because the Court is *government* and government is prohibited from taking property without due process of law. The very instances of what are denominated as discrimination cited in petitioners' brief illustrate the separation of state and judicial authority. They refer to cases involving a Negro's right to vote,³ status in a labor union,⁴ use of interstate buses,⁵ and city ordinances or State statutes restricting use or ownership of property based on color.⁶ In each instance the controversy was submitted to the courts, either by the persons claiming to have been discriminated against, or by the State for criminal prosecution. If it were not for the independent action of the judiciary in each instance, the person's rights as finally adjudicated would not have been defined, much less protected. Where else may private citizens obtain protection of their personal and property rights against infringement but in the courts?

That is precisely the case here. Respondents, as plaintiffs in the District Court, sought the Court's protection in enforcing private property rights which they acquired by virtue of owning and occupying property in an area where each property therein was subject to a restriction against ownership or use by Negroes. These constituted reciprocal easements,⁷ an enforceable right as to each property created by private contract or covenant uniformly established and identical in application; the character and extent of the restriction was recorded among the land records of the District of Columbia and constituted notice to all persons required to take cognizance thereof.⁸ The record shows

³ Smith v. Allwright, 321 U. S. 649.

⁴ Steele v. Louisville and Nashville R. R. Co., 323 U. S. 192.

⁵ Morgan v. Virginia, 328 U. S. 373.

⁶ Buchanan v. Warley, 245 U. S. 60; Harmon v. Tyler, 273 U. S. 668; City of Richmond v. Deans, 281 U. S. 704.

⁷ Mays v. Burgess, *supra*; Meade v. Dennistone, *supra*.

⁸ Section 45-501 D. C. Code (1940).

that Urciolo, a white man, purchased the properties in question with full knowledge of the restriction and immediately re-sold to the Negro defendants who also had full knowledge of the restriction. Certainly it cannot be claimed any of them had pre-existing rights in the properties; yet it cannot be denied that the respondents had pre-existing property rights which would be destroyed by the continued ownership and occupancy of the Negroes. There was nothing to compel the white petitioner, Urciolo, to acquire the properties if he objected to being subjected to the restriction—the courts are not concerned with an individual's idea of what is valuable or beneficial or what he may consider valueless or burdensome—nor were the Negro petitioners required to acquire the properties. But, when they did so acquire the properties, they become subject to the pre-existing property rights of others whose properties were similarly restricted. Hence, there arises a right in the parties to obtain enforcement of their property rights. Can this be denied any citizen of the United States; can it be seriously urged that the District Court was without jurisdiction to adjudicate this private right of property, or that the Court cannot enforce a property right? *If this were so, the respondents certainly would be deprived of their property without due process of law.*

Here, respondents have defined property rights; the petitioners have no property rights. Petitioners denominate these covenants as "racial zoning" and by this clever device say there is no difference between this case and *Buchanan v. Warley, supra*. The city ordinance in that case did not create a private property right any more than a zoning regulation creates private rights; they may be changed at the will of the legislature, town council or zoning commission. They could not give rise to equitable enforcement by a private citizen; their enforcement is by criminal penalty, prosecuted by the State. But it cannot be denied that the Constitution guarantees to all citizens due process of law in the enforcement of their private contract rights.

In answer to the same contention made here by petitioners, the California Court in *Burkhardt v. Lofton* (1944), 63 Cal. App. 2d 230, 146 P. 2d 720, stated:

"The decree of the trial court in the instant case was not, within constitutional principles, action by the State through its judicial department. Plaintiffs' rights are derived from their contract, the subject matter of which belonged exclusively to the contracting parties *** if the contract is valid it cannot be nullified under any theory that courts are without power to enforce it."

Appropriately, it may be asked: How and in what manner are any of the petitioners deprived of their property without due process of law? What property? What failure of due process?

The white man was not required to buy the property or sell to the excluded class and the Negroes acted with full knowledge of the pre-existing rights of respondents and, hence, acquired no rights. How can petitioners say, then, that they are denied due process? With no property rights to assert, as against the enforceable property rights of respondents, how can they claim deprivation of due process? The voluminous record in these cases stands in testimony of the full trial, with all defendants before the court, appeal to the United States Court of Appeals and the present review by this Court.

"The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard *the right for which the constitutional protection is invoked*. If these are preserved, the demands of due process are fulfilled." (Italics supplied) *Anderson National Bank v. Luckett*, 321 U. S. 233, 246. See also: *Davidson v. New Orleans*, 96 U. S. 97.

Although the contention of petitioners, that the judicial enforcement of such private restrictions is unconstitutional, has been urged and earnestly briefed and argued in every

case of this kind arising in the District of Columbia in the last ten years and in most of such cases arising in the States,⁹ no court has accepted the proposition.

These contentions are not new. They were strenuously urged in 1925 in *Corrigan v. Buckley*, 271 U. S. 323, and in the Court of Appeals, *Corrigan v. Buckley*, 55 App. D. C. 30, 299 F. 899, (now the United States Court of Appeals for the District of Columbia) notwithstanding the statements of petitioners that the questions here presented now were not then decided. An examination of the briefs, as well as recollection of the argument, in both Courts indicates clearly that the precise propositions were thoroughly treated. Beginning at page 98 of their brief, as elsewhere, petitioners distort the plain meaning of the language of this Court.

At page 329 of the opinion, this Court set the pattern of the decision:

"The defendants then prayed an appeal to this court on the ground that such review was authorized under the provisions of Sec. 250 of the Judicial Code—as it then stood, before the amendment made by the Jurisdictional Act of 1925—in that the case was one 'involving the construction or application of the Constitution of the United States' and 'in which the construction of certain laws of the United States,' namely Secs. 1977, 1978, 1979 of the Revised Statutes *** were 'drawn in question' by them. *This appeal was allowed in June, 1924.*

"The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of Federal laws is drawn in question, does not, however, authorize this court to entertain the appeal; and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. (Citing cases) *And under well settled rules jurisdiction is wanting if such questions are so unsubstantial as to be plainly without color*

⁹ See cases cited on page 7, *supra*.

of merit and frivolous. (Citing cases).'' (Italics supplied)

Thus the court clearly stated that if the appellants' contentions were lacking in merit, the Court lacked jurisdiction. This is exactly the reverse of what petitioners, at page 300 of their brief, say:

''In fact, since this Court had no jurisdiction, it cannot be said to have given final consideration to any question not involved in reaching that conclusion.''

What this Court in the Corrigan case did was to examine the same contentions now here made and found each to be ''so unsubstantial as to be plainly without color of merit and frivolous.'' That, respondents submit, is exactly what the contentions now made must be considered—unsubstantial and without merit.

This Court specifically held at page 330 of the opinion:

''The Fifth Amendment 'is a limitation only upon the powers of the general government,' (citing cases) and is not directed against the action of individuals. . . . And the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals'. Virginia v. Rives, 100 U. S. 313, 318; United States v. Harris, 106 U. S. 629, 639. 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' Civil Rights Cases, 109 U. S. 3, 11. *It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void.*'' (Italics supplied)

On the contention of the appellants in the Corrigan case that the action of the Court was the action of government and prohibited by the Fifth and Fourteenth Amendments (the precise contention now insisted upon by petitioners), this Court said, by way of recapitulation, at page 331:

"The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation. (Citing case) Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law (citing cases)."

It is to be noted that the court below entered a decree of injunction substantially in the language of the judgments in the present cases.

Thus this court, nine years after *Buchanan v. Warley, supra*, clearly and decisively distinguished between the constitutional validity and enforceability by the courts of individual property rights, and *state action* relating to control of property because of race or color. The former is sustained; the latter is prohibited.

(c) The Civil Rights Acts (Sections 1977, 1978 and 1979, Revised Statutes) cannot prohibit judicial enforcement of the restriction.

As previously urged in *Corrigan v. Buckley, supra*, petitioners urge that the judicial enforcement of the covenant violates Section 1978 of the Revised Statutes of the United States. (8 U. S. C. Sec. 42). Here again petitioners distort the clear meaning of the language of this Court in *Corrigan v. Buckley, supra*, at page 331:

"Assuming that this contention drew in question the 'construction' of these statutes, as distinguished from their 'application', it is obvious, upon their face, that while they provide, inter alia, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they, like the constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

Here again is the clear distinction between enforceable private rights and the restraints on governmental power.

With equal clarity, the Court of Appeals in *Corrigan v. Buckley*, 55 App. D. C. 30, with reference to the applicability of Sections 1977, 1978 and 1979, Revised Statutes, stated at page 32:

"Defendant claims protection under certain legislation of Congress. As suggested in the opinion of the learned trial justice, this legislation was enacted to carry into effect the provisions of the Constitution. The statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendant's rights under the Constitution, there can be none under the statutes."

2. Restrictive Covenants Are Not Contrary to the Public Policy of the District of Columbia.

Petitioners urge that these restrictive covenants "are contrary to the traditional and official public policy of the United States". (Page 111 of petitioners' brief). An examination of their reasons in support of the above-quoted statement suggests immediately their utter misconception of long established principles of judicial appraisal of what constitutes public policy as it applies to the enforcement of private contract rights:

"The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. (Citing cases) The meaning of the phrase 'public policy' is vague and variable; courts have not defined it and there is no fixed rule by which to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. ***

"In determining whether the contract here in question contravenes the public policy of Arkansas, the Constitution, laws and judicial decisions of that State and

as well the applicable principles of the common law are to be considered.

Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 356.

It is firmly settled that the sources of public policy are the Constitution and statutes, judicial opinions and the general customs of the jurisdiction where the public policy is being examined. No further statement need be made.

And it is uniformly accepted that a court should only declare contracts void as against public policy when expressly or impliedly forbidden by the paramount law, by some principle of the common law, or by the provisions of a statute. *McCoyen v. Pew*, 153 Cal. 735, 96 P. 893; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 47 P. 582; *Langdon v. Conlin*, 67 Neb. 243, 93 N. W. 389.

Applying these well defined tests to the present cases it is clear that the indentures are not in any sense contrary to public policy in the District of Columbia.

In Part 1 of this brief respondents have shown that there are no constitutional prohibitions relating to these indentures.

Pursuant to Art. 1, Sec. 8 of the Constitution the Congress has exclusive control over the District of Columbia and pursuant thereto may enact legislation applicable to the District of Columbia in the same manner and to the same extent that the state legislatures function in the several states. The Congress exercises police power over the District of Columbia—it has created a municipal corporation, moneys for its operation being annually appropriated by the Congress through a complicated and comprehensive budget system under the Federal Budget Bureau. Congress has provided separate schools,¹⁰ hospitals and recreational facilities for white and colored and the administration of these services recognizes the separation of the races. (*Plessy v. Ferguson*, 163 U. S. 537.) It cannot be

¹⁰ *Wall v. Oyster*, 36 App. D. C. 50.

argued Congress is not aware of these conditions, for annually many days of Congressional hearings are devoted to the appropriation of funds for negro and white educational, recreational and hospital facilities. If the legislature—and it cannot be ignored that it is the National Legislature—had adopted non-segregation as its policy it would, in these annual examinations of District of Columbia public facilities, abolish these long-standing governmental practices.

The Federal Government acting pursuant to the Alley Dwelling Act of 1934, the Lanham Act,¹¹ and the United States Housing Act of 1937 erects and operates all forms of public housing in the District of Columbia. Without exception the policy of these agencies and the actual operation of all public housing in the District of Columbia is the maintenance of separate developments for whites and negroes.¹²

Petitioners devote many pages of their brief in an attempt to show that the many and difficult problems of negro citizens stem from enforcement of restrictive indentures, but they fail completely to recognize or deliberately ignore the fundamental rule of judicial construction that courts are not concerned with purely political issues.¹³ Alleviating over-crowding, crime, sub-standard health conditions and the like are the "legitimate exercise of the police power" of Congress over the District of Columbia. Neither this Court nor the trial court can correct or remedy the conditions complained of. Petitioners' brief would indicate many and varied individuals, groups, organizations and even government agencies have devoted much time and effort to the problems complained of; yet, the Congress to which the solution of these problems must be addressed, has not acted, either for the District under its police power, or nationally by whatever authority and by whatever con-

¹¹ Public Law 849, 76th Congress.

¹² See National Capital Housing Authority Annual Report to the President of the United States, for the fiscal year ending June 30, 1945.

¹³ Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721.

trol it may have. Neither are Presidential statements or other declarations of political officers of the Government the test of what is public policy, but only the practice of these officials in the administration of public laws entrusted to them for execution may be examined. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353. Certainly the varying opinions of laymen, lawyers, or judges as to the demands of the interest of the public are not to be considered. *Hartford Fire Ins. Co. v. Chicago M. and St. P. R. Co.* (C. C. A. 8th) 70 F. 201, affirmed in 175 U. S. 91; *Burkhardt v. Lofton*, 63 Cal. App. 230, 146 P. 2d 720.

The United States Court of Appeals for the District of Columbia, while not technically the highest court of a state, in the local judicial system has the same powers of the highest court of a state, and its mandates are final, subject only to allowance of the writ of certiorari by this Court.¹⁴ That Court in *Corrigan v. Buckley*, 55 App. D. C. 30, 299 F. 899, expressed clearly the proper test of public policy and recognized a fundamental truth in stating:

“It follows that the segregation of the races, whether by statute or private agreement, where the method adopted does not amount to the denial of fundamental constitutional rights, cannot be held to be against public policy. Nor can the social equality of the races be attained, either by legislation or by the forcible assertion of assumed rights.”

And the court pointed out also that even in the absence of statutory pronouncements, “the same general and settled public opinion controls in respect of the segregation of the races in churches, hotels, restaurants, lodging houses, apartment houses, theaters, and places of amusement.”

This adjudication of the applicable public policy in the District of Columbia has been re-examined (in the light of what petitioners and previous defendants in similar cases have denominated as changed conditions) and affirmed by

¹⁴ U. S. Code, Title 28, Section 347.

the United States Court of Appeals periodically since its pronouncement in 1924.¹⁵

Chief Justice Groner very ably pointed the way in *Mays v. Burgess*, 79 App. D. C. 343, 147 F. 2d 869, where, speaking for the court, he stated:

"As stated before, rights created by covenants such as these have been so consistently enforced by us as to become a rule of property and within the accepted public policy of the District of Columbia.

"Little need now be said on the subject of that policy. The proposition is not new and was unsuccessfully urged in the *Corrigan* case, *supra*, in this court and in the Supreme Court. And nothing is suggested now that was not considered then. The Constitution is the same now as then, and we are cited to no new public laws, nor indeed to any other course or practice of Government officials, which the *private* action of the original owners of the block in question contravenes. And the public policy of a State of which courts take notice and to which they give effect must be deduced in the main from these sources. Surely it may not properly be found in our personal views on sociological problems. As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and are approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons. And these accepted practices are not intended to and should not be considered to imply the inferiority of either race to the other."

It is respondents' position that what petitioners denominate as Federal public policy is not applicable to private property rights created by private contract among private individuals. However, petitioners' contentions relating thereto, it is submitted, are not valid, even if applicable.

¹⁵ *Torrey v. Wolfes*, *supra*; *Russell v. Wallace*, *supra*; *Cornish v. O'Donoghue*, *supra*; *Grady v. Garland*, *supra*; *Hundley v. Gorewitz*, *supra*.

They rely on the United Nations Charter as "official public policy of the United States against discrimination based on race or religion." That document, say petitioners, pledged the United States to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race".¹⁶ This is a high objective, but it does no more than pledge this Nation to encourage and assist *other nations*, not fortunate enough to have our form of government. As a treaty it refers only to matters *between* nations involved,¹⁷ and cannot be applied to private rights among the citizens of any member nation. Nor has Congress undertaken any enactments on the subject affecting the private rights of citizens.

An examination of petitioners' brief fails to disclose any statutory enactment by Congress which would have the effect of declaring any National policy on the subject of the separation of the races by private action of private parties, and we know of none. Sections 1977, 1978 and 1979 of the Revised Statutes of the United States are not applicable.¹⁸

Chief Justice Groner further observed in *Mays v. Burgess*.¹⁹

"That the broad social problem, of which the question in the instant case is but one aspect, is both serious and acute, no thoughtful person will deny. That its right solution in the general public interest calls for the best in statesmanship and the highest in patriotism is equally true. But it is just as true that up to the present *no law or public policy has been contrived or declared whereby to eradicate social or racial distinctions in the private affairs of individuals*. And it should now be apparent that if ever the two races are to meet upon mutually satisfactory ground, *it cannot*

¹⁶ Petitioners' Brief, p. 115.

¹⁷ Paragraph 7, Chapter 1, Article 2, Charter of the United Nations and Statutes of International Court of Justice, U. S. Treaty Series 993.

¹⁸ *Supra*, p. 18.

¹⁹ 79 App. D. C. 343, 147 F. 2d 869, certiorari denied 325 U. S. 868.

be through legal coercion or through the intimidation of factions, or the violence of partisans, but must be the result of a mutual appreciation of each other's problems, and a voluntary consent of individuals. And it is to this end that the wisest and best of each race should set their course." (Italics supplied)

3. Restrictive Covenants Are Not an Undue Restraint on the Power of Alienation or Repugnant to Other Rules of Property.

Petitioners' position on this proposition cannot be sustained. The United States Court of Appeals for the District of Columbia has specifically ruled on this point.²⁰

This question was settled in *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547, involving the validity of a covenant to the effect that intoxicating liquors should never be sold on the premises. Mr. Justice Field, delivering the unanimous opinion of the Court, and in answer to the contention that the condition was repugnant to the estate granted, says:

"But the answer is that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character."

In *Torrey v. Wolfes, supra*, the Court of Appeals in upholding the validity of a covenant identical with the one now under consideration, held that any citizen, whether he be

²⁰ *Cornish v. O'Donoghue*, (1929) 59 App. D. C. 359, 30 F. 2d 983, certiorari denied 279 U. S. 871; *Torrey v. Wolfes*, (1925) 56 App. D. C. 4, 6 F. 2d 702; *Hundley v. Gorewitz*, (1942) 77 U. S. App. D. C. 48, 132 F. 2d 132; *Grady v. Garland*, (1937) 67 App. D. C. 73, 89 F. 2d 817, certiorari denied, 302 U. S. 694.

white or colored, has the right to sell his property "under such lawful restrictions as he may see fit to impose."

The true test of whether restrictions or conditions are void as a restraint on alienation is whether the restriction imposed restrains *all* alienation. There is a clear distinction between restrictions against *all* alienation and restrictions against alienation to *particular persons* or for *particular purposes*. Clearly, the covenant restrictions in the present case do not forbid *all* alienation; but, rather, the owner is free to sell his property at any and all times to any and all persons, except those of the excluded race. He is free to transfer a complete fee simple estate subject, however, to an equitable, enforceable right in the nature of an easement.²¹

CONCLUSION.

The restrictive covenant here involved is a valid and subsisting property right; is not prohibited by the Constitution or invalidated by any Acts of the Congress; is not an undue restraint on alienation or repugnant to the public policy of the District of Columbia and, hence, is entitled to enforcement by appropriate judicial decree on application of parties whose rights are involved.

It is respectfully submitted that the judgment below be affirmed.

HENRY GILLIGAN,

JAMES A. CROOKS,

Attorneys for Respondents.

²¹ Mays v. Burgess, 79 U. S. App. D. C. 343, 147 F. 2d 869, certiorari denied 325 U. S. 868; Castleman v. Avignone, 56 App. D. C. 253, 12 F. 2d 326; Wiegman v. Kresel, 270 Ill. 520.